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Supreme Court, U.S.
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No. 98-2052

In The

Supreme Court of the United States

DREW FENTON and KLAUS WAGENER,

Petitioners,

v.

UNIHEALTH AMERICA, INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The California Supreme Court

REPLY TO OPPOSITION TO PETITION FOR CERTIORARI

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INTRODUCTION

The most striking thing about Respondents' Opposition to the Petition is what it does *not* say. Nowhere in the Opposition do Respondents argue that section 1395u allows carriers to pay Medicare fees due to physicians to corporations which engage them to work in hospitals as independent contractors. Instead of meeting Petitioners' legal contentions head on, Respondents attempt to avoid the force of those arguments by using a variety of evasive strategies.

As shown below, none of those strategies is successful. Petitioners have shown that the California Court of Appeal was flatly wrong in its decision of a question of Federal law which is profoundly important to physicians and patients throughout the country. This Court should grant the writ in order to establish definitively and unmistakably that arrangements such as that CEMS entered into with the physicians it engaged are unlawful, and must be discontinued.

I. THE FEDERAL ISSUE WAS PROPERLY RAISED AND CONSIDERED ON APPEAL.

Respondents assert that the Federal issue Petitioners have presented to this Court was not properly raised in the California courts (Opposition, pp. 1-2, 7-10). That is not the case.

Respondents accurately point out that Petitioners did not raise the issue in the trial court (Opposition, pp. 1-2), but erroneously assert that Petitioners failed to comply

with the provision of Rule 14(1)(g)(i) which requires disclosure of the stages at which the Federal issue was raised (Opposition, pp. 1-2), and that Petitioners misrepresented the facts in that regard (Opposition, pp. 6-7). In fact, Petitioners fully and accurately disclosed in the Petition (at pp. 4-5) that the issue was first raised in the Court of Appeal, was decided on the merits by the Court of Appeal, and was again raised in Petitioners' petition to the California Supreme Court.

Crucially, Respondents are wrong in asserting that Petitioners failed to raise the issue in accordance with California procedure. While the *general* rule is that California appellate courts will not consider issues not previously raised in the trial courts, there is an exception for issues of pure law to be decided on undisputed facts. Such issues may be raised, and the appellate courts have discretion to consider them. *Ward v. Taggart*, 51 Cal.2d 736 (1959).

The issue under 42 U.S.C. section 1395u Petitioners raised here was a pure question of law on the basis of undisputed facts, and the Court of Appeal *did* exercise its discretion to decide it on the merits. It is therefore properly before this Court.

Despite Respondents' claim that the section 1395u is "factually intensive (Opposition, p. 7)," it is in reality a pure question of law on the undisputed facts:

(1) Section 1395u(b)(6)(A) prohibits physicians from assigning their Medicare earnings to a corporation which engages them to work in a hospital department under a contract with the hospital to staff that department *unless* the physicians are *employees* of the corporation.

(2) It is undisputed that Respondent CEMS had an exclusive contract to staff the Emergency Department at CMC, and that it engaged Petitioners to work in that department. At trial, Petitioners contended they were employees, while *Respondent's* asserted they were independent contractors. Crucially, the *jury* decided that Petitioners were independent contractors, and Petitioners conceded the issue on appeal (see Appendix A to Petition, pp. 16-17). Thus, it was established indisputably on appeal that Petitioners were independent contractors. The fact that Petitioners took a contrary view at trial is irrelevant. It is also undisputed that Petitioners assigned all of the fees due them for their services, including Medicare fees, to Respondent CEMS in exchange for an hourly salary.

Those undisputed facts raise the legal issue Petitioners have put before this Court. No other factual findings are necessary to establish Appellants' legal right to an accounting for funds unlawfully assigned under section 1395u.

Thus, Petitioners have met this Court's requirements for jurisdiction of an issue on certiorari, and have established that the record in this case presents an important issue of Federal law in a form appropriate for this Court's review.

II. THERE ARE NO INDEPENDENT STATE GROUNDS WHICH SUPPORT THE COURT OF APPEAL DECISION ON THE ILLEGALITY OF THE ASSIGNMENT UNDER 42 U.S.C. 1395U.

Respondents assert that the Court of Appeal had an adequate and independent state ground for it not to grant Petitioners an accounting, because that court found there was substantial evidence to support the existence of the contract under which Petitioners assigned the fees due them in exchange for an hourly salary (Opposition, pp. 12-13).

The contention is baseless. Petitioners do not contest the existence of the contract as described by the Court of Appeal and by Respondents. However, no amount of evidence as to that agreement and its terms can resolve the question presented here: the question of the *illegality* of that contract under section 1395u. The "substantial evidence" to which Respondents refer do *not* and cannot serve as an "adequate and independent nonfederal ground" for the Court of Appeal decision on the issue of the contracts' illegality under Federal law.

Respondent also contends that Petitioners should be barred from raising the question of the contract's illegality because Petitioners never *rescinded* the contract (Opposition, p.14). The argument is obviously specious. California law agrees with general Common Law in holding that an illegal contract is *void*, and that there is no need for rescission. *Estrada v. Alvarez*, 38 Cal.2d 386, 388 (1952); Witkin, Summary of California Law, Contracts, section 879 (9th ed. 1987).

III. THIS CASE MEETS THE STANDARD OF RULE 10 BECAUSE THE COURT OF APPEAL DECISION WRONGLY DECIDES AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN SETTLED BY THIS COURT.

Respondents assert that the standards for grant of certiorari under Rule 10 have not been met because the Court of Appeal did not "decide with any precision" the question raised here (Opposition, p. 15)."

Rule 10(c) provides for review by this Court where a state court has decided "an important question of federal law that has not been, but should be, settled by this Court . . . " That standard is met here.

Respondents do not, and could not reasonably, deny that the issue Petitioners raise here is an important issue of law which this Court has not, but should, settle. The amicus brief filed in this Court by the American Academy of Emergency Medicine, its California State Chapter, and the American College of Legal Medicine demonstrate that importance. Respondents contend, however, that the Court of Appeal did not decide that important issue "with any precision" because the discussion in the Court of Appeal opinion is "very brief" (Opposition, p. 15).

In fact, though brief, the decision of the Court of Appeal on the issue is eminently precise: it states clearly and directly that Petitioners assignment of funds was lawful under section 1395u(b)(6)(A)(ii)'s provision allowing payment "to a care facility." The problem with that statement is not that it is unclear, but that it is clearly *wrong*. Strikingly, Respondents do *not* even attempt to

argue that the statement was *correct* as a matter of Federal law.

IV. RESPONDENTS' ARGUMENT THAT SECTION 1395U IS NOT APPLICABLE TO THEM BECAUSE IT GOVERNS MEDICARE "CARRIERS" IS WHOLLY SPECIOUS.

Respondents also seek to avoid the force of section 1395u by pointing out that it applies to Medicare "carriers (Opposition, p. 15-16)." The point is utterly devoid of merit. Section 1395u prohibits "carriers" from *paying* the public funds due to physicians under the Medicare program to entities like CEMS. It follows *logically* that a statute which prohibits the carrier from *paying* such funds to entities like CEMS also makes *illegal* for such entities to *receive* those funds. It is simply the other side of the coin.

If, as Respondents suggest, physicians cannot sue those whom they illegally assigned their Medicare fees for accounting, the intent of Congress in passing section 1395u will be defeated. Section 1395u *does* prohibit Petitioners from assigning Medicare fees to CEMS, it *does* prohibit the carrier from paying them to CEMS, and it *does* prohibit CEMS from receiving them. This Court should grant review in order to settle those points firmly in law for the benefit of physicians and patients throughout the country.

CONCLUSION

For the reasons stated above and in the Petition, Petitioners respectfully request that the writ be granted.

Dated: August 6, 1999

Respectfully submitted,

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